No. 15611

In the

United States Court of Appeals

For the Ninth Circuit

HARRY L. MARSHALL, JR.,
Appellant,

vs.

WESTFAL-LARSEN & CO.,
Appellee.

Appellee's Opening Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 15,611

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I.

STATEMENT OF CASE

Appellant's statement of the case is inaccurate in respect of certain facts. Appellant also sets forth alleged facts which were not accepted by the Court below.

At the port of Corral, Chile, and at the time of the accident there was not a general exodus or disembarkation of passengers from *The Hardanger* similar to that which had occurred for sightseeing purposes at other ports. The Captain and Marshall, who were friends, were going ashore by themselves early in the morning for a trip up river to Valdivia. At other ports the passengers were disembarked directly to a small shore boat or tug from the foot of the gangway. At Corral, Chile, there was a 100-foot barge at the foot of the gangway. It was necessary to cross this

barge in order to reach the shore tug. The barge was quite stable in the water as compared with a small shore boat or tug. The barge was moving up and down from two to three feet in a harbor swell, but the lower platform of the gangway was not always two or three feet from the lower platform except at certain times according to the swell. At the time Marshall jumped, the barge was about ½ meter or 20 inches below the gangway platform and was still moving up on a swell which had not yet reached its peak or crest. There were two of the vessel's seamen on the deck of the barge, one of whom Nelson, was within 20 feet and not more than 30 feet of the lower gangway platform, and who could have rendered assistance to Marshall if necessary. Nelson called to Marshall not to jump. Marshall disregarded this warning and jumped to the deck of the barge, landing in such manner that he twisted his knee.

There was no contention or evidence that there was any defect or insufficiency in the gangway as such or in the barge as such. There was no evidence of any unseaworthiness of *The Hardanger* or of any negligence on the part of the respondent appellee. All of the evidence and the Court's findings pointed to appellant's own fault and lack of care as the sole cause of his injuries.

II.

ERRORS

Appellant has adopted the position that this is a trial *de novo* and that the clear weight or preponderance of the evidence is contrary to the findings. We refer to the statement by the Supreme Court in *McAllister v. U. S.*, 348 U.S. 19, 20; 99 L.ed. 20, 24 as follows:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not

> set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the Appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. * * *"

Thus a trial *de novo* is not required and the findings and judgment below are accepted as true unless clearly erroneous.

Appellant makes no objection to the conduct of the trial or to the court's rulings. Therefore, appellant's only assignment of error is that the lower Court's conclusions are erroneous. Appellant makes this broad general statement several times in his Opening Brief, and has attempted to establish such broad general assertions primarily by the constant repetition of appellant's own testimony and inferences therefrom.

III.

ARGUMENT

A. Legal Principles.

Appellant's brief is premised on the proposition that appellee is an insurer of appellant's safety. This is not true. Courts have time and again rejected this supposition.

> "As a general rule, a vessel engaged as a common carrier of passengers must exercise as high a degree of care * * * as the means employed and the circumstances of the case will permit; but *the vessel is not an insurer* of the safety of its passengers." [Emphasis added] 80 C.J.S. "Shipping", Section 193-a; Accord. *The Serpa Pinto,* 45 F. Supp. 255; *Moses v. Compagnie Generale Transatlantique,* 16 F. Supp. 197; *The Empress of Scotland,* 11 F.2d 783; (D.C.S.D.N.Y. 1926); *Goode v. Oceanic Steam Nav. Co.,* 251 F. 556 (C.C.A. 1918); *The Vulcania,* 8 F. Supp. 300, D.C. Mass. 1934).

It was appellant, not appellee, in this case who did not act as a reasonably prudent person should have acted in the circumstances.

> "If a passenger disregards a warning, which has been so given that he has notice of it, he cannot recover for injuries caused by the danger against which he has been warned." 80 C.J.S. "Shipping", Section 194-b. See also *Erdman v. United States et al.*, 143 F.2d 198 (C.C.A. 2 1944).

Appellant cited three cases purporting to show liability in this case as a matter of law. *Burrows v. Lownsdale,* 133 F. 250 (C.C.A. 9 1904); *Mawson v. Eagle Harbor Transportation Co.,* 148 Wash. 258, 265 Pac. 595; and *The Ocracoke,* 159 F. 552 (D.C.E.D. Va. 1908). None of these cases cited stands for such a propsition either as a matter of factual similarity or as a matter of legal principle. Furthermore, not one of those courts did what appellant asks this Court to do, namely reverse the findings of the District Court.

In *The Ocracoke* decision cited by appellant, the plaintiff had been told by defendant no gangplank would be used whatsoever. Therefore, if plaintiff desired to get off the ship, he would have to jump from the ship to the dock. He did so and was injured. This is hardly analagous to the case at hand where appellant was warned not to jump.

This case is not analagous to the *Burrows* and *Mawson* cases as claimed by appellant. In those cases the gangways were clearly defective, being narrow, long, at steep angles and without guard rails. Furthermore, in both cases the lower courts were being affirmed in their decisions and conclusions as to questions of fact and law. Thus, the principle of giving weight to the findings below was present.

There is no question that the gangway in this case was

not defective in any way. Of course, any gangway or any part of a ship that is used negligently by a passenger can result in his injury. The mere fact that someone is injured does not prove negligence. There are no findings of fact nor in fact any evidence that appellee did not provide a reasonably safe means for passengers to disembark from the vessel and the District Court so found.

In the following cases passengers were injured while disembarking from one vessel to another while the vessels rolled with the ocean swells. They all contended that the method of landing was unsafe and that they had inadequate or no assistance. The cases are *The Empress of Scotland,* 11 F.2d 783 (1926); *Goode v. Oceanic Steam Nav. Co.* 251 F. 556 (C.C.A. 2 1918); *The Vulcania,* 8 F.Supp. 300 (D.C. Mass. 1934). In all cases the Courts decided against any liability.

In *The Empress of Scotland* libelant was injured while disembarking from the main boat to a tender rolling from the movement of the sea. Libelant's position was that he had inadequate aid in disembarking. The court in *The Empress* case rejected liability stating:

> "He had decided to go ashore as many of the other passengers had done; He knew as well as anyone that the tender was rolling for he had been observing it as he stood on deck, and while those ahead of him were boarding her. This was not his first experience around the water. He could not have failed to realize that there was some risk, though not a very great one, for an able bodied man, and the inference is that whatever injury he received must have been due to his own lack of care in watching the gunwale of the tender which he was about to step over." (Pages 784-85)

The District Court in this case made the same factual conclusion as to Marshall's lack of care and resulting injury.

In the *Goode* case the plaintiff was injured after descending the gangway onto a waiting launch to visit a harbor. After helping plaintiff step down into the launch, the seaman let go of her. The motion of the launch caused plaintiff to fall. The Circuit Court, in affirming the District Court, ruled that defendants were not negligent and was particularly concerned with the duty of a passenger to request assistance if necessary.

> "We think that, if her control was not that of an ordinary person, it was incumbent upon her to ask for the extra assistance which was not otherwise indicated." (Page 558)

It is clear from the record in this case that assistance was available. The seaman on the barge warned Marshall not to proceed. Marshall nevertheless did so and was hurt.

In *The Vulcania* the plaintiff was disembarking from a lifeboat to a motorboat to the dock. In stepping from one boat to the other he fell and injured his leg. The lifeboat was drawn up beside the motorboat on the latter's portside so the two boats were in contact for some distance amidships. The sea was slightly choppy and there was a swell which caused a more or less continuous motion to the boats. Libelant did not wait for assistance, which he could have obtained. The court noted:

> "Libelant was a vigorous man, in the prime of life who described himself as having been at the time unusually agile and active. I regard it as a fair inference of fact that his confidence in his ability to proceed without aid and his impatience led him to attempt to step from one boat to the other at a point somewhat nearer the stern than the point of contact between the two boats, and, while so doing a movement of one or both of the boats caused him to lose his balance and before he could regain it, he slipped off of or overstepped the seat on the motorboat and fell * * *" (Page 302)

Marshall, too described himself as an active person and it is a fair inference that he felt he could make the jump without waiting for a safer moment or without aid, in disregard of the warning given.

The court in *The Vulcania* further stated:

> "The boats were staunch and seaworthy. * * * Libelant presented evidence tending to show transferring passengers from one boat to another is a procedure attended with hazards, but it added nothing to the dangers obvious to anyone of ordinary intelligence. Assistance was available for those who desired aid. * * * There is no suggestion of a refusal to lend aid in response to a request. If the libelant elected not to wait for assistance, he must assume the responsibility for the election and for its consequences." (Page 302)

Appellant here made his own election not to wait for or ask for assistance and disregarded a clear warning. He therefore must take the responsibility for the exercise of that option. As the District Judge in this case found, so the Court in *The Vulcania* found:

> "The want of due care on the part of the libelant as the sole contributing cause defeats his rights to recovery." (Page 302)

In all these cases and in the case at issue, trial courts originally rejected a passenger's claim because of his own negligence as the sole proximate cause of injury. It is not unusual to bar a passenger from relief if he caused his own injury. See, for example, *Weill v. Campagnie General Transatlantique* 113 F.2d 721 (C.C.A. 2 1940) (Defendant not liable where plaintiff passenger tripped over tarpaulin spread on deck) *Erdman v. United States*, 143 F.2d 198, (C.C.A. 2 1944) (Defendants not liable to plaintiff passenger injured in swimming pool after disregarding warning) *Fetan v. Atlantic and Caribbean Steam Nav. Co.*, 60 F.2d

328 (D.C.E.D.N.Y. 1932) (Plaintiff's own negligence in failing to get to the ship on time and trying to get aboard a moving ship prevented his recovery) *In re Keansburg Steamboat Co.,* 249 F.472 (C.C.A. 2 1918) (Plaintiff's failure to hear or understand warnings not to walk in dangerous area precluded their recovery) *Plant Investment Co. v. Cooke,* 85 F. 611; (C.C.A. 5 1898) (passenger precluded from recovery because he used unsafe portion of gangplank when a safer way was provided).

B. Findings and the Evidence Support the Judgment.

Appellant has divided part of his argument into two headings devoted to B.—Findings and C.—Evidence. Since that treatment requires considerable repetition of the same points, appellee limits its argument to one heading with special sub-headings which will be devoted to the major points of disagreement.

References to the Transcript of Record are indicated by "TR" followed by the page number. References to the testimony in the depositions are indicated by the same symbols used by appellant:

"KD"—Kaldefoss' Deposition EX B (TR 102)
"SD"—Sellevald's Deposition EX C (TR 102)
"ND"—Nordfonn's Deposition EX E (TR 116)

As part of the argument on the findings and evidence appellant continued with the untenable position that the mere happening of an accident to a passenger is sufficient to impose liability upon the carrier. Appellant would thus make appellee an insurer without the necessity of proving any negligence or unseaworthiness. This is not the law.

Appellant's mere reiteration of the same points claimed

at the trial is not enough for reversal. There is in fact a presumption of correctnes of the findings of fact of a trial judge who has seen and heard the witnesses. 2 C.J.S. "Admiralty" Section 190 (b)

The Trial Court with clear evidence to support its conclusions determined that Marshall ignored the warning not to jump, that the vessel did furnish a safe means of disembarkation, that Marshall did not exercise reasonably prudent care in disembarking and that Marshall alone caused his own injuries.

1. DISEMBARKATION AT CORRAL.

Although appellant attempts to draw a similarity between disembarkation at Corral, where the accident occurred, and other ports, the situation at Corral was different and actually safer than that usually available. This is evident from Marshall's testimony. At the other ports there were usually 6 - 8 passengers, including women going ashore (TR 64). It was necessary at these ports to disembark directly to a boat from the gangway (TR 54). They did not board the shore tug or launch at these other ports by descending first to a barge (TR 67). These shore boats had considerably greater movement than a barge (TR 65) and the barge was more stable (SD 26). The barge thus did not bob around as a small launch would, although as a result of a swell there was an up and down movement of from two to three feet. There was however, no fore and aft movement and no sideways movement (TR 70-71) as would be necessarily true of a small boat in a swell at the foot of a gangway. The bottom platform of the gangway was slightly above the deck of the barge when it was at the crest of a swell. Nordfonn on the barge was in an excellent position to judge the distance be-

tween the lower platform and the barge which he says was about ½ meter (19-20 inches) when Marshall jumped and that the barge was still on the way up (ND 5, 11-12).*

Marshall was familiar with the situation and the risks. He had disembarked many times before and had been a passenger for a long time previously (TR 37, 63-65). In this instance Marshall knew the barge was riding a rising swell (TR 70). He knew assistance was immediately available if he needed it either from the captain or the seaman on the barge but did not ask for any. There is no question that the gangway was in safe and good condition and that the barge was a proper means of debarkation.

The trial Court properly ruled that Marshall's injuries were his own, not appellee's fault.

2. PRESENCE OF CREWMEN ON THE BARGE.

It is evident from appellant's entire argument that he initially tried to make it appear the Captain was the only one present. Appellant denied there was anyone on the barge (TR 66-69). Appellant also contends the Captain was within two or three steps behind him (TR 68). The Captain himself, however, said he was still on the upper platform at the head of the gangway talking to the Chief Officer (SD

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* "Mr. Erskine: Q. Now, I believe you said, Mr. Nordfonn, that the lower platform of the gangway was about one-half of a meter above the deck of the barge, is that correct? A. Yes. (ND 11-12) Q. Was the distance from the lower platform of the gangway to the deck of the barge longer than the length of my arm from my shoulder to the end of my fingers? A. Is that the vertical distance? Q. Down from the height? A. It wasn't that much when he jumped. Q. It was less than that? A. Yes. Q. At that time the sea had a swell of about one meter, is that correct? A. Yes. The lighter was almost up, then. Q. Have you a clear recollection that at the instant Mr. Marshall jumped, the sea had reached—the sea as it was reaching the barge had reached to the top of its swell? A. It wasn't all the way up, but it was still on the way up when he jumped." (ND 12)

15-17).* Thus the Captain was behind Marshall as he descended the gangway and as the Court found, but at a considerably greater distance than the two or three steps claimed by Marshall.

Irrespective of the Captain's position with relation to Marshall how does appellant try to avoid the warning given him by Nelson? As stated above he first tried to do so by claiming that no one else was on the barge. But the following testimony shows he observed the barge and must have seen men on the barge. Marshall paused on the way down the gangway. He stood there for about a minute and looked up to the deck, where the Captain was talking to Kaldefoss and he looked down at the barge (TR 120). He then went ahead down to the lower platform. He stood on the lower platform for several seconds (TR 120). He noticed the position of the barge; he noticed there was a swell (TR 43); he noticed the barge was unloaded and empty and he noticed the movement of the barge (TR 44). He looked at the barge (TR 45). He could see the complete deck of the barge (TR 68). He looked at the holds and he saw the passage alongside the holds (this is where Nelson was standing) was too

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* The Captain testified as follows: "Q. Now, did Mr. Marshall step or jump from the lower platform of the gangway while you were still talking to Mr. Kaldefoss or had you started to descend the stairs when he moved from the lower platform onto the deck of the barge? A. No. He must have jumped when we were standing there still talking. Q. You were not on your way down behind him at the time he jumped? A. No. Q. Your recollection is that you were still talking to Mr. Kaldefoss? A. Yes. (SD 15) * * * A. My recollection is that I was still at the head of the gangway talking to Mr. Kaldefoss when this happened. * * * Q. Where were you when you saw that; do you recall? A. I would say I was on the head of the gangway up on the platform. Q. You were up on the upper platform of the gangway? A. Yes. Q. And then when you saw that, you started down the stairs, did you? A. Yes. Or shortly afterward. I think that he was on his feet when I started down." (SD 16-17)

narrow (TR 69)—yet he still claimed no one was on the barge. He was faced, however, with the testimony of Captain Sellevald, the Chief Officer Kaldefoss and the two seamen Nelson and Nordfonn that the latter two men were definitely on the barge. Marshall's denial that crewmen were on the barge would certainly justify the Trial Judge's disbelief in his testimony.

Second, appellant tries to show that Nelson was on the stern of the barge and could not have given a warning which was heard by Marshall. Appellant tries to put Nelson and Nordfonn in a position on the barge contrary to fact. Nordfonn's position is not particularly important. Nelson who gave the warning, however, was close to Marshall.

3. LOCATION OF NELSON ON BARGE AND HIS WARNING TO MARSHALL.

In discussion covering fourteen pages of the Opening Brief (31-45) appellant makes many assumptions, and inferences in order to support his contention that Nelson and Nordfonn were 65-90 feet from Marshall while he was on the lower platform. Appellant contends there was therefore no ground for the Court to reject Marshall's testimony. But the Court did reject Marshall's testimony and had good ground to do so. The record is quite clear that Nelson was within 20 to 30 feet from Marshall when he warned Marshall not to jump, and was not 60 or 65 feet away. Marshall and Nelson both testified in person at the trial. Both of these men were observed by the Trial Judge. There is no question but that the Trial Judge accepted Nelson's testimony. Nelson's testimony as to his position on the barge was also supported by two other witnesses. The two diagrams Exhibit 1 and Exhibit D (Kaldefoss EX A for identification which is referred to by appellant as Exhibit A, but which was introduced as Exhibit D) (TR 103) and the marks JN and K3 on these two diagrams supported by appropriate

transcript and deposition references (hereinafter discussed) definitely show Nelson's position within 20 to 30 feet of Marshall and not 65 feet. In this connection it must be remembered that Exhibit 1, although drawn by appellant to a scale of ⅛ of an inch to one foot, was based upon approximations of various witnesses rather than actual measurements (TR 33). But even on the basis of Exhibit 1 there is no foundation whatsoever for appellant's oft repeated comment that the two crewmen (Nelson and Nordfonn) were 65-90 feet from the lower platform and therefore from Marshall, when the warning was given

Nelson, who gave the warning, testified he was at the point marked JN on Exhibit 1 (TR 81-82). By measurement on Exhibit 1 we find his position was between 18-20 feet from the foot of the gangway and was located opposite the aft end of No. 1 hold. Kaldefoss (KD 15) placed Nelson at the dot next to K3 of Exhibit D. It is noted that this dot is between the first two holds. K3 itself is at the forward end of No. 2 hold. Based upon the location of the gangway in Exhibit D, K3 was about 18-20 feet from the foot of the gangway, but even on the basis of Exhibit 1 there is only 10 feet between the aft end of No. 1 hatch (JN on Exhibit 1) and the forward end of No. 2 hold (K3 on Exhibit D) or about 5-7 feet from the aft end of No. 1 hatch to the dot at K3. Thus by relating Kaldefoss' testimony to Exhibit 1 which was not available at the time of Kaldefoss' deposition, Kaldefoss placed Nelson at not more than 25 to 27 feet from the foot of the gangway.

The other witness Nordfonn located Nelson by placing his finger at K3 (ND 4) about where Nelson was placed by Kaldefoss (KD 15). Thus if we accept Nelson's statement (JN on EX 1) he was within 18-20 feet of Marshall. But even by taking K3 on Exhibit D marked by Kaldefoss and

Nordfonn between the first two holds or the forward end of the second hold, Nelson was not more than 27-30 feet from Marshall.

Appellant's Opening Brief (page 37) has misquoted Nordfonn's testimony. Appellant quotes Nordfonn (ND 4) as locating Nelson at "K5" and then appellant makes measurements from K5 which was about the middle of No. 2 hold. Reference, however, to ND4 shows Nordfonn placed his finger on K3 of Exhibit D and not on K5 when he located Nelson's position.

Since Nelson testified that he was located at JN on Exhibit 1 which was 18-20 feet from the gangway and since Nordfonn and Kaldefoss placed Nelson at K3 or a dot next to K3 on Exhibit D which is 27-30 feet from the gangway there is certainly no basis for the long process invoked by appellant (Op. Br. 29-45) in reaching the conclusion that Nelson was 65 feet from Marshall. Nelson, Nordfonn and Kaldefoss all locate Nelson on the barge within an area of 8-10 feet near the after end of No. 1 hold and within 20-30 feet from Marshall.

The Captain although he knew two men were on the barge could not locate them accurately (SD 20). The other witness, appellant Marshall, denied there were any men on the barge at all. Thus the trial Court accepted Nelson's testimony.

We think it is obvious from the above that Nelson was close to Marshall, that Marshall saw Nelson and that he heard Nelson's warning.

In at least two places of the Opening Brief appellant makes an inference that neither Kaldefoss nor the Captain heard Nelson's warning. There is no testimony supporting appellant's inference. Neither the Captain nor Kaldefoss was asked any question as to whether he did or did not hear the warning. If they heard the warning, it would only have been cumulative of the testimony obtained from Nelson and

Nordfonn who were down on the barge. Since, however, Kaldefoss and the Captain were at the head of the gangway behind Marshall talking ship's business there is every reason why they should not have heard the warning given by Nelson. Appellant did not ask either of them about Nelson's warning. This is not, however, any foundation for appellant's inference that no warning was ever given.

Nelson testified:

> "A. Well, when I saw Mr. Marshall come down the gangway, I tell him not to jump, I call up 'Don't jump.'
>
> Q. Where was he when you said that to him?
>
> A. He was down on the platform.
>
> Q. On the lower platform of the gangway?
>
> A. Yes. Q. Go ahead.
>
> A. And he didn't answer me, and just jumped, and when he landed on the deck he was falling, but I couldn't see how he came down on the deck. I just saw he was falling over, and after that was somebody coming down and helped him up, but who it was I cannot really remember." (TR 83)

Although Nelson said Marshall didn't answer, Nordfonn testified:

> "Q. Did Mr. Nelson have any conversation with the passenger before he jumped? A. As far as I remember, I think he said to him that he shouldn't jump.
>
> Q. Did the passenger make any reply?
>
> A. Yes sir. He said something. There was something said to the effect that it was OK, and then he jumped." (ND 5).

What the situation would have been had Marshall heeded the warning is not necessary to determine. After Nelson had warned Marshall, Nelson testified:

> "A. I didn't see that because, you see, when Mr. Marshall fell I was running forward to help him, but

before I came to Mr. Marshall there was somebody else who helped him up. Maybe some of the crew of the barge, or someone else; I can't remember who it was." (TR 90)

Marshall was not furnished with an unsafe means of disembarkation. He was injured because he refused to heed the warning given by crewman Nelson. In spite of appellant's repeated argument (Op. Br. 4, 21, 29 to 46) that he did not hear the warning there is sufficient evidence that he must have heard the warning and ignored it. The Trial Court made the finding that appellant disregarded Nelson's warning and this finding is entitled to a presumption of correctness which has not been overcome by appellant's mere restatement of the evidence.

4. CAPTAIN'S SILENCE NOT AN ORDER FOR MARSHALL TO JUMP; CREWMAN'S WARNING SUFFICIENT.

Appellant does not consider the findings as a whole, but attempts to single out a finding here and there and then draw inferences which are without support in the record. For instance, after referring to the movement of the barge in the swell appellant tries to show that Marshall was actually "obliged to jump" because the Captain did not personally warn him, or did not go down to assist him. (Op. Br. 16-18). The fact that Marshall was warned by one of the crewmen of the vessel and that the crewman was available on the barge to assist Marshall if necessary is disregarded by appellant (Op. Br. 18-21) who complains that the Captain personally failed to take such steps. Appellant seems to feel that the Captain alone should serve his needs and that anyone else, particularly a crewman could not perform any duties for the vessel. In this manner appellant

works around to the unfounded conclusion that upon hearing the crewman's warning not to jump he could assume that the Captain directed him to ignore the warning. By the same devious reasoning and by relying upon his own testimony (Op. Br. 24-28) appellant reaches the conclusion that the Captain in effect actually *directed* him to jump to the barge at that moment.

Entirely irrespective of what the Captain did, or did not do, we must here point out that although the Captain was made a party he was never served with process, even though he appeared at a deposition taken in San Francisco long before the trial. At the trial the Captain was dismissed as a party. Thus appellant at the trial and in his present appeal complains only of appellee Steamship owner. A steamship owner's duties, however, toward passengers are performed by the entire ship's company and not just the Captain. Therefore to conclude as appellant has done that appellee is at fault because the Captain did not personally warn Marshall is to overlook the warning that was given Marshall by the crewman Nelson, employed by appellee shipowner.

C. Appellant's Admission of Fault.

Prior to the trial, Captain Sellevald had testified by deposition that Marshall told him the accident was Marshall's own fault and that it "had nothing to do with you" (SD 11).

Prior to the trial Kaldefoss testified by deposition that Marshall had admitted to him it was his own fault and that Marshall had said "I thought I was younger than I am" (KD 13).

At the trial Marshall also admitted he told the Captain "I feel it was my fault" (TR 74). He also admitted having

said he found he was not quite as young as he thought he was (TR 75). He made the same statements to the Chief Officer Kaldefoss (TR 75). He made no complaints of the method used to disembark or of the location or condition of the barge or of the position or condition of the gangway (SD 11-12 and KD 13). He had these conversations with the Captain and Chief Officer either that night—the night of the day on which the accident occurred—or the next morning (TR 75). He was quite frank in confessing to his admissions. He claims, however, that he was trying to be kind to the Captain, and that when he confessed to his fault he did not know the extent of the injuries (TR 74). The evidence is to the contrary.

Appellant testified to the following nature of his injuries before he returned to the vessel from Valdivia and before these admissions of fault were made:

His knee kept getting bigger and bigger—about the size of a large cauliflower (TR 49). At Valdivia he could not walk. He was taken to the hospital. There were two doctors—one a surgeon (TR 49). He was x-rayed and blood taken from the knee (aspirated). His leg was placed in a cast (TR 49). He was taken to the hotel at Valdivia in an ambulance (TR 50). He was taken back to the river boat in an automobile. He had to be helped a great deal because of the cast (TR 50). He was later carried aboard the vessel because he could not walk up the gangway (TR 50). He then went to bed (TR 50). It was after all of this that he still made the admission of his fault—and that it had nothing to do with the Captain.

This was not an attempt to get an admission against interest for purposes of a law suit, but merely a voluntary admission after appellant had had time to think about the accident. The facts of the case make it clear that Marshall

was referring to the circumstances showing it was his own fault; that he should not have jumped; that he should have heeded the warning and that he should have requested assistance if he were going to jump at that time. The admission is therefore very significant.

The circumstances of the admission in *The Ocracoke,* 159 Fed. 522, cited by appellant are entirely different than in this case.

An admission of appellant's fault, coupled with facts which preclude liability of appellee strongly supports the conclusion there was no liability (Op. Br. 49).

There was no objection by appellant to the introduction of such testimony and he must therefore have admitted relevancy. It was evidence of liability, not impeachment. It is now too late to claim it is of no effect. In *Gulzoni v. Tyler,* 64 Cal. 334 (1883) the court stated at page 336:

> "The evidence of what the Plaintiff said when asked whether he blamed anybody on the boat should not have been stricken out. Evidence of what he said in regard to the occurrence was admissible for the defense. If he expressed an opinion as who was to blame, the Defendants were entitled to have the benefit of it."

Appellant cites authority which he says makes his admission of fault insufficient where appellee is liable as a matter of law. Again appellant is trying to make the appellee an insurer of the passengers' safety by contending that the mere happening of an accident imposes liability.

D. Sole Fault.

This is not a case for the application of comparative negligence doctrines. The Court has found—a finding fully supported by the evidence—that the proximate cause of

appellant's injuries was solely his own negligence. Therefore appellant is not entitled to recover any damages.

E. Damages.

The discussion of damages is inappropriate since damages do not create liability regardless of the sympathies involved.

IV.

CONCLUSION

Appellee respectfully submits that the evidence supports the District Court in its findings of fact and conclusions of law, that there is no law nor legal principle requiring any result other than that already found, that appellee maintained a safe vessel, provided a safe gangway, and landing facilities, gave warning to Marshall in the instant case, and had assistance available if necessary. Appellant has failed to overcome the presumption of the validity of the District Court conclusions and has not established error. Appellee prays that this appeal be dismissed and the decree below affirmed.

Respectfully submitted,

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Adams & Charles
Edwin L. Gerhardt
Alan H. Nichols
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